No. 3084

United States Circuit Court of Appeals

For the Ninth Circuit

CLINTON J. HUTCHINS

Appellant

vs.

AMERICAN STEAMSHIP "GREAT NORTHERN," Her Engines, Boilers, Tackle, Apparel, Boats, Furniture and Appurtenances, and A. AHMAN, Master, Bailee and Claimant Thereof, and THE GREAT NORTHERN PACIFIC STEAMSHIP COMPANY, a Corporation, Owner Thereof

Appellees

BRIEF OF APPELLEES

Upon Appeal from the United States District Court for the District and Territory of Hawaii

CAREY & KERR,
Proctors for Appellees.

SMITH, WARREN & WHITNEY,
of Counsel.

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The appellant is specific in his statement of the negligence imputed to the vessel and its owners.

Briefly stated his claim is that the base or bottom of the shower bath was a porcelain bowl about two feet or so square, with sides from three to four inches high, with a slight depression in the center, and a slope thereto from all directions to the drain

in the center of the bowl; that the sides of the shower bath were constructed of marble slabs, with service pipes for both hot and cold water running up the side of one of the marble slabs; that in order to reach and enter the bath, it was necessary to step over the top of the rim of the bowl; that the bowl was slippery and difficult to stand upon and there was no provision made by means of rails or otherwise for grasping or holding on in case of slipping, nor was there any provision made by rubber mats or otherwise to prevent slipping and falling in the bath.

The answer of the master of the ship, as claimant, denies negligence and denies faulty construction and unsuitableness of the bath. It also denies that the floor or bowls were in any respect more slippery than any porcelain floor or other clean and sanitary bath fixture; and denies that there was no provision by means of rails or otherwise for holding on in case of slipping. The answer shows that the steamship was provided with numerous bath rooms, some fitted with porcelain tubs and others with showers, and all of the latest modern and most commodious and practical design and equipment, and that it was optional with the libellant, whether he would use a shower bath or tub bath. That the bath was well lighted by electric light, and the whole method of construction, the form, the materials used, and the facilities provided and avail-

able for holding, and the condition of the bath as to being slippery or otherwise, were all plainly visible to the libellant. The shower bath is described by the claimant as follows:

> "(3) That at all of the times mentioned in said libel the shower bath referred to in the said libel as that in which or in connection with which the libellant is alleged to have been injured was and is a room approximately thirty inches square, having its walls made of upright marble slabs, open in front and having a pipe overhead and across the front as a curtain rod or support carrying sliding rings for front curtain; that the floor thereof was formed by a porcelain basin of the most approved and modern material and type, measuring approximately twenty-four inches square, practically level, having no more slope than was and is necessary for proper drainage, and having sides about six inches above the level of the outside floor. That the said basin or floor was not difficult to stand in or upon, nor was the said bathroom or its equipment in any respect unsafe or dangerous, or carelessly or negligently constructed, or likely in any manner to cause a person using the same to slip or fall.
>
> (4) That the said shower bathroom was and is provided with a metal handle plainly visible and firmly fixed on the back wall at a convenient height for any person to reach, for instant use if desired; besides which there were a number of other convenient and immediately accessible means of support in and about the said shower bathroom; all of which were plainly visible and conveniently available and useful for the purpose of being taken or used by any person using the said shower bathroom

should occasion require or such use thereof seem desirable.

(5) That said floor or basin was made of porcelain which is the usual and approved material for such purpose, to insure cleanliness, and was clean and no more slippery than any other porcelain bath."

The answer also alleges that the placing of rubber mats or other floor covering in the basin or on floor of the bath rooms is not necessary, efficient or of any value in rendering the floor any more safe to stand upon, consistent with proper cleanliness and practical use thereof, and that the bath room was proper and safe in construction and equipment. Contributory negligence is also claimed.

On this state of the pleadings the case was tried, beginning on February 16, 1917, in open court at Honolulu. The court heard most of the witnesses, but in addition thereto the depositions of several witnesses were produced in behalf of the appellees and one deposition in behalf of the appellant. By arrangement during the trial, the judge visited the ship when it was at Honolulu, in company with representatives of the parties (pp. 301, 212, 260), and examined the bath room and the shower bath in question. After argument the case was taken under advisement and a written opinion was filed by the court on the 3d day of April, 1917 (p. 645), and final decree was entered dismissing the libel on April 13, 1917.

During the hearing the libel was amended by the addition of paragraph 4a, as shown on pages 35 to 38. In substance this additional allegation alleges negligence in the employment of the ship's physician and negligence and want of care in the treatment of the appellant by this physician. Answer to this paragraph 4a was made by the claimant as set forth on page 44, denying the allegations.

After the appellant had offered evidence in support of his case, a motion was made by the appellees, to strike from the record all of the testimony adduced by the appellant relating to the subject matter of this amendment and answer thereto. The court took this motion under advisement (pp. 238-9).

I.

Description of the Accident.

Mr. Hutchins in testifying as a witness, repeats several times his description of how the accident happened. In substance his claim is set out on pages 74 and 75:

> "A. On the night before, on the 17th, I told the bath steward that I would like to have a shower bath in the morning about half past six, and he came and called me about half past six and I got up and threw on my overcoat over my pajamas and went into the bath, and I hung up my overcoat and my pajamas and I went over to the bath and I turned the water on. There were two shower baths facing each other, and I used the one facing the shower baths on the right, and I went up to the shower bath and put my hand in and put my right foot over into the bath,—it was rather a high bath, a high-sided bath, rather hollow, and I put my foot in it and felt of the water, the temperature of it on my arms, and then I put my left foot over, and then I slipped, and I put my hand out to catch hold of something and I fell over into the other shower bath which was on the opposite side.
>
> The Court: You mean on the other side?
>
> A. Yes, I fell sideways, and I reached out for something to get hold of, but there was nothing to hold on to, and I felt a crunching in my shoulder, my arm slipped out from under me, so much so that it seemed to me that I dislocated the shoulder. . . .
>
> (P. 76): Mr. Davis: Where were both feet?

A. In the basin.

Q. Just before you fell just fully describe what you reached for and what you did particularly?

A. Why, as I pulled my left foot up and over following the right as I felt of the water and was going to get in the shower, the water was coming down very heavily, it was instantaneous, I put both feet in and I reached out to grab for anything.

Q. Was there anything for you to reach hold of?

A. Nothing.

Q. Where did you grab for, where did you reach for?

A. Anything to get hold of.

Q. Your face was towards the back part of the bath?

A. Yes.

Q. And how did you reach out?

A. I reached out as hard as I could with my right arm.

Q. And there was nothing to catch hold of?

A. No."

He also testifies that the basin was porcelain, was filled with water and very slippery; the sea was calm, and he did not notice any movement that morning. "It was the only morning we had when there seemed to be none." Did not notice that the ship was rolling or pitching. (p. 77.)

On page 82 he adds that at the time of the accident:

"I had my hands out feeling for the water, and then I pulled my left foot over and just as I put my weight on both feet they flew out from under me."

And again on page 123 he was asked:

"Q. Had you gotten into the water falling from the shower before you slipped?

A. Just in it, just going under it. The water was splashing onto me, just as I got in, I got almost under it, part way under it at least when my feet flew out. I wasn't wholly under the water at the time. . . .

(P. 124): Q. On what foot was your weight resting more than the other, if either, when you slipped?

A. If heavier on any it was on the right.

Q. More on the right?

A. More on the right than on the left. I pulled my left, it was over, and just as I got it down they flew from under me.

Q. You had not really then set your weight back on the left foot before you slipped?

A. I think they were so close there was scarcely any difference, if any.

Q. Practically even?

A. Practically even, yes."

Mr. Hutchins also testified on page 159 as follows:

"Q. In falling did both of your feet fly out simultaneously, or first one and then the other?

A. Practically about the same time. When I felt myself go both feet flew out, there was no stopping till I finally found that I had struck something. My large toe was black the next morning. My feet went out that way and I caught myself here. The soreness here did not disappear for months.

Q. Did you have any warning whatever of the slip before it occurred?

A. Practically none.

Q. You had time only when you realized your feet had flown out to endeavor to turn and strike as safely as you could?

A. I grabbed for anything this way, and threw out this hand and then I went down.

Q. That is, you grabbed out with your right hand?

A. Yes.

Q. That was a spasmodic grab, to grab hold of anything there was to catch hold of?

A. Yes, anything.

Q. You did not have in mind that you were grabbing at any particular thing?

A. Nothing at all.

Q. It was practically an involuntary grabbing motion to save yourself?

A. That's it.

Q. Which you might have made if you had been in clear air?

A. Yes.

Q. *Were you feeling the water with one or both arms?*

A. *Both, rubbing it on my arms this way with my hands.*"

And on page 166, on cross examination:

"Q. You are wearing glasses, Mr. Hutchins?

A. Yes, sir.

Q. How long have you worn them?

A. About twenty years.

Q. You wear them constantly?

A. Yes.

Q. Did you have them on that morning?

A. No.

Q. Are you able to see as well without glasses as with them?

A. Not as clearly. I can see everything but it does not clear up until I put my glasses on."

The specific negligence claimed and on which the appellant rests his case is in the shower bath, as distinguished from the room in which the shower bath was located. According to his testimony he slipped in the basin of the shower bath itself.

According to his testimony, furthermore, he was foolishly stepping into a porcelain basin under running water without using his hands to steady himself.

But assuming for the moment that the condition of this shower bath was such that the ship would be answerable under the circumstances described, it was for him to sustain the burden of proof that the accident happened in the manner alleged. The weight of the evidence indicates that the accident

happened entirely outside of the shower bath, and in a different manner, and the trial court so found.

There was but one eyewitness to the accident other than the appellant himself. This was Dr. Barney R. Simons of Philadelphia, Pa., whose deposition was taken in behalf of the appellees, and whose description of the accident differs materially from that of the appellant. Dr. Simons testifies (p. 574) as follows:

> "A. Mr. Hutchins stood in the space between the two showers—the passageway between the two showers at a point where I have placed the x with a circle around it on the plan.
>
> Q. Will you tell us just exactly what happened?
>
> A. Mr. Hutchins stood where I have marked the plan with an x and a circle around it and as he was a large man he occupied practically the entire passageway so I couldn't enter the shower opposite the one in which he was tem-- pering the water. I sat down on the stool marked on the plan with a square and observed Mr. Hutchins until such time as he might get out of the passageway so I could enter the opposite shower. Mr. Hutchins stood with his left hand against the wall marked xxx on the plan and with his right hand he was tempering the water—I might say, feeling the temperature of the water. The ship at about this moment lurched. At the same time Mr. Hutchins endeavored to step into the shower. He stepped with his right foot forward, resting his weight on the left,—when his left foot slipped

from under him and he fell with his left shoulder upon the edge of the basin of the shower marked S. He fell helplessly—I mean by that he had no chance to catch or save himself whatever, as he fell. . . .

(P. 576.) Q. At the time Mr. Hutchins fell he was in the act of stepping into the shower?

A. Basin. Stepping under the shower.

Q. He slipped when his one foot was still in the passageway and the other was in the air?

A. Was in the air.

Q. And it was the foot which was still in the passageway which slipped out from under him?

A. That is right.

Q. And it occurred coincident with the lurching of the ship?

A. Coincident with the lurching of the ship.

Q. He stepped with which foot?

A. With right foot resting his weight on the left.

Q. As he stepped did he support himself against the side of the shower or did he just step in?

A. I can't recall that. The last I can recall is where he stood with his left hand against the wall which I have marked with the three x's (xxx). I can't say whether or not he dropped this left hand as he started to step under the shower.

Q. He didn't support himself with the right hand?

A. I didn't see that there was anything there to support him with the right hand.

Q. Could he not have supported himself by placing his right hand against the side of the shower?

A. He could have caught hold of that marble slab. He could have caught a hold of the slab on the after side of the shower marked (y) with his right hand. Of course I can't say what support that would have given him.

Q. At the time of the accident I understand you to say it was very well lighted and all the conditions which existed were perfectly obvious to him?

A. Yes."

Dr. Simons also testified that there was evidence of rough weather and the ship was pitching, rolling and lurching occasionally (p. 574 and p. 577). And on page 586 he repeats:

"Mr. Hutchins had not yet placed his foot in the basin when he fell. his foot had not been put down in the basin; it had been raised in the air in the act of stepping in and was over the basin."

Thus, according to this witness, who appears to be entirely disinterested, the accident happened while Mr. Hutchins was still upon the tiled floor of the bath-room, not in the shower bath itself. Dr. Simons had an excellent opportunity to see exactly what occurred as he was sitting in the bath-room facing Mr. Hutchins and but a few feet from him, waiting his own turn to enter one of the shower baths. (p. 574.)

The trial court, after careful consideration of the testimony of both Mr. Hutchins and Dr. Simons, concludes that the testimony of the latter is the more reliable. The court said (p. 660):

> "There is a sharp conflict in the evidence as to whether the libellant's fall which caused his injury, was caused by slipping on the floor of the bathroom or by there being no hand-hold on the wall, even if it were conceded that there was no hand-hold there. There was an eye-witness to the accident, whose deposition, if true, shows that the libellant fell before he ever entered the bath-room, before he put either foot on the floor of the basin, and that his fall was caused by the rolling of the vessel, libellant losing his balance when he started to step into basin, one foot on the floor of the compartment outside the bath-room, the other raised for the purpose of stepping in. Dr. Barney R. Simons of Philadelphia, testified by deposition, taken September 28, 1916, that he was a passenger on the vessel at the time libellant was injured, and that he witnessed the accident, 'was the only one present and the only one who saw the accident,' that he desired to take a shower-bath himself and went to the place for that purpose, and libellant was there when he got there, that libellant was standing outside of the bath-room and occupied practically the entire passageway between the one he was about to enter and the one on the opposite side of the passageway, and he (witness) sat down on a stool near by and observed libellant until such time as he might get out of the passageway so he (the witness) could enter the opposite shower, that libellant stood with his left hand against the wall and

with his right hand was feeling the temperature of the water; 'the vessel about this moment lurched, at the same time Mr. Hutchins endeavored to step into the shower, his right foot forward, resting his weight on his left, when his left foot slipped from under him and he fell with his left shoulder upon the edge of the opposite shower.'

"I have carefully examined the deposition of this witness and I find no reason to refuse to believe his statements. He appears to be disinterested, intelligent and in every respect worthy of credence, and I think it would be contrary to common sense and the dictates of right and justice to refuse to believe him and to accept as true the statements of the libellant, who is interested, however respectable and worthy, which are so flatly contradicted by him.

"I therefore find that libellant did not slip on the bottom of basin, that he fell because he lost his balance on account of the vessel lurching when he was about to step into the bath-room, and that his fall was not caused by any negligence of the vessel or its owners or servants."

In passing we wish to call attention to the fact that the court uses the word "bath-room" to designate the enclosed space used for the shower itself, distinguishing this from what it calls the "compartment" in which the showers or "bath-rooms" are installed. This is so obvious that it would not require explanation but for the reference in appellant's brief on pages 22 to 24. The word "bath-

room" is so used by the court as it is by the appellant himself (p. 16 appellant's brief), as well as by some of the witnesses, although others use the word as including the whole compartment in which the showers or shower bath-rooms are located.

We find in appellant's brief at page 24 the claim that the "issues in the case as made by the pleadings did not leave it open to the court below to find or hold that the accident happened outside of the bath-room." It is claimed the libel alleges that the accident occurred after the libellant had entered one of the shower baths and that this is not denied by the pleadings but on the contrary is specifically admitted, and a paragraph of the answer is quoted (see page 24, appellant's brief).

This was so thoroughly answered, however, by the findings of the trial court that we will here quote (p. 662) as follows:

> "Proctors for libellant strenuously insist that the answer of the claimant admits that libellant fell in the bath-room and that the admissions in the answer obviate the evidence given by Dr. Simons. I have carefully read the answer and I find no such admission.
>
> "In support of the contention that the answer does make such admissions, one of the proctors for libellant, in a typewritten argument which he was permitted by the court to file after the argument in the case had been concluded, culls out from the sentence quoted below from the answer, the words therein which

I have underscored, omitting all the remainder of the sentence:

"'Answering the allegations of paragraph 4 of the libel, this claimant has no knowledge except by information from others, but basing his answer thereto upon his information and belief, and *while admitting that the libellant, while using or attempting to use the shower room or compartment on the port side of the bath-room on "C" deck of said vessel, lost his balance and fell and sustained some bruises or injury, the exact nature and extent of which are to this claimant unknown,* yet this claimant denies that said accident occurred or injuries were sustained by any negligent, careless or faulty construction of said bath or shower room or accommodations, but were in fact the result of the failure of libellant to exercise common care in view of the motion of said vessel while so traveling on the high seas.'

"It is hardly necessary to say that neither the whole of the sentence, nor the part underscored makes any admission that libellant slipped upon the bottom of the basin or that libellant ever got into the basin.

"There is no admission in the answer that obviates the facts testified to by Dr. Simons, which prove that libellant did not slip upon the bottom of the basin, but that he lost his balance and fell on account of the motion of the vessel when he started to step into the shower room and before he ever placed either foot on the floor or basin thereof."

Dr. Simons makes it plain that in saying Mr. Hutchins fell suddenly without opportunity to catch himself as he fell, he meant that he did not have

an opportunity of getting his left hand under him to break the force of his fall (pp. 581-582). The court will note that the appellant's brief does not distinguish between this and the opportunities or rather the facilities that were available for a man using due and ordinary care in stepping into a porcelain bath. It seems to be assumed that because the falling man went down so suddenly as not to have been able to save the force of the fall by putting his hand under him, that he also had no opportunity to save himself from getting into that predicament. But a child ought to know better than to step into a porcelain bath without steadying himself, so that if the appellant's description of the accident is accepted, or if Dr. Simons' description is true, it still depends upon Mr. Hutchins to justify his not having taken hold. His claim is not that he did take hold and the handle broke, or his hand grasped some fixture that was insufficient to afford the necessary support and protection, but that he tried stepping into the bath without using or trying to use the facilities furnished. He took his chance.

It seems clear that the negligence complained of in the libel (pp. 17, 18), and the slipperyness of the basin, and its faulty construction, if it existed, did not cause the accident.

We submit that the appellant did not fall by reason of any condition of the equipment or lack of

equipment in the shower bath. He actually fell before he got into it, if the weight of the evidence is accepted, notwithstanding his claim in his libel and in his testimony is that the basin was slippery and that this was the primary cause of his fall. (pp. 77, 81, 174.)

If it is true (as he claims on page 160) that he stood in front of the compartment feeling the temperature of the water, splashing it over both arms, and then stepped into the basin with his right foot and brought his left foot in, and had no more than placed it on the floor of the basin when both feet shot out from under him instantaneously and he fell heavily, then we submit that his own statement shows negligence in stepping into the shower bath without attempting to support himself while so doing. He says (on page 82) that he had his hands out feeling for the water "and then as I put my weight on both feet they flew out from under me." Stepping into a bath without using one or both hands to steady himself, is equivalent to taking the risk of slipping and falling, and this would be true whether it was a shower bath or any other porcelain bath. To step into a bath tub without taking hold is to take a chance, and this is common knowledge. If his testimony is assumed to be true he ought not to recover because of his own negligence.

It may also be noted that in telling Chief Engineer Morris of the accident that same day he said

nothing about a lack of facilities to hold to, or as to lack of mats, or as to slippery surface of the porcelain, but complained of the way the base was built and to the fact that the angles or corners were rounded, as will be seen from the following excerpt from Mr. Morris' testimony:

> "A. The way he spoke of it to me was that in stepping there he had stepped on the rounding and lost his balance through that—the rounding on the bottom of the base.
>
> Q. Did he say anything to you as to what he claimed with reference to the liability of the company?
>
> A. When he mentioned it to me I said to him, 'Why didn't you hold on to something? You are on a ship; you are not on shore.'
>
> Mr. Cathcart: We move to strike that out as being irresponsive.
>
> Mr. Carey: Q. What did he say?
>
> A. Well, he complained of the way that that base was built; he said that that should be of absolutely square corners.
>
> Q. Did he say anything else?
>
> A. No.
>
> Q. Specifically, did he make any claim to you that there should be a rubber mat in the bath?
>
> Mr. Cathcart: Objected to as leading.
>
> A. No."
>
> (pp. 469-70.)

As already shown, Mr. Hutchins insisted that the weather was calm and there was little or no

ship motion; but while there may have been no very pronounced rolling, there certainly was some motion.

Chief Engineer Morris said:

> "The ship was rolling; not very much; I should say a roll of probably 4 degrees." "I should not say it was stormy; she had a long, gentle roll. I think the weather was pleasant that day." "All ships roll if they get the proper wave length." (pp. 474-5.)

Dr. Simons says (p. 573):

> "The weather was bad and the sea was very rough."

He was asked how he recalled that it was rough. He answered:

> "Most of the night before I was laying there awake. It was so rough I couldn't sleep. I like to have rolled out of the upper berth which I occupied. That morning the steward called me and said my bath was ready, and I didn't want to go because of the pitching and rolling of the ship. I told my wife I didn't think I would go, and she said, 'You haven't missed a morning bath in a year and you may be sorry if you don't take one.' And I got out very cautiously and went to the shower and supported myself with my hand on each side of the passageway—that is, on the wall of the passage—as I went along. It was impossible to walk straight, unassisted, without holding on to the side of the passageway." (pp. 573-4.)

At another place in his deposition he said that the ship was pitching and rolling and lurching (p. 577).

However, the condition of the sea is not left entirely to the recollection of witnesses. Reference to the ship's log-book produced by third officer George Grundy (p. 496) shows the entry that morning between four and eight A. M.:

> "Fine and clear weather, light breeze, smooth sea, heavy northwest swell."

This swell must have had an appreciable effect on a vessel traveling almost west. The accident occurred about six-thirty A. M.

Our claim is that whether the accident occurred in the manner described by Mr. Hutchins, or in the manner described by Dr. Simons, there is no liability shown and the libel should be dismissed.

II.

Presumptions Upon This Appeal.

The findings of fact of the trial court in an admiralty case, made upon conflicting testimony most of which was taken in open court, or where the credibility of witnesses is involved, will not be disturbed on appeal unless they are found to be clearly against the evidence.

The Hardy, 229 Fed. 985.

Peterson v. Larsen, 177 Fed. 617.

Perriam v. Pacific Coast Co., 133 Fed. 140.

The Oscar B., 121 Fed. 978.

Alaska Packers' Association v. Domenico, 117 Fed. 99.

Jacobsen v. Lewis Klondike Expedition Co., 112 Fed. 73.

To meet this, the appellant urges that there is an exception to the rule where the trial court does not have the benefit of the personal presence of the witnesses. But we submit that:

(a) The court did have Mr. Hutchins before it and did hear his testimony, which the court decided was not conclusive, and it also had the benefit of oral testimony from most of the other witnesses; and

(b) The judge visited and inspected the bath during the trial by arrangement with the parties and in the presence of their representatives.

The exception to the rule, therefore, does not apply in this case. No doubt where, as in cases cited and relied upon by appellant, the testimony is taken before an examiner or commissioner, the reason of the general rule would not apply. But here the court had every witness for the libellant before it excepting Lefevre. It also had many of the witnesses for the defense in open court and heard their testimony.

The appellant argues that there is a presumption of negligence arising out of the very fact of the accident.

But according to appellant's own story, he slipped in the shower basin, when placing his feet therein, while he was not holding with his hands. If he had taken hold of the handle, or the rod, or the curtain, and such appliance proved insufficient and broke, or he had taken hold of the slab or the door knob only to find the same undependable, a different case would be presented. He says the facilities provided were inadequate, but he did not put them to the test and preferred to take the step without first taking hold of anything whatever. He did not reach out until he was already falling and then it was too late to save himself.

Under these circumstances the proximate cause of his fall, according to his own testimony, was his failure to take hold.

As was said in the opinion of the court in *Puget Sound T. L. & P. Co. v. Hunt,* 223 Fed. 952:

> "In every personal injury case the plaintiff must establish two propositions: First, that the defendant was negligent; and second, the causal connection between the negligence and the injury complained of. Negligence is sometimes assumed, as where the doctrine of *res ipsa loquitur* applies, or where there has been a violation of a statutory duty, but the proximate cause of an injury is never presumed."

The doctrine of *res ipsa loquitur* does not apply where the plaintiff alleges specific acts of negligence, instead of general negligence.

> *Midland Valley R. Co. v. Conner,* 217 Fed. 956.
>
> *White v. Chicago G. W. R. Co.,* 246 Fed. 427.

Nor does that doctrine, when applied, have the effect of shifting the burden of proof so as to make it necessary for defendant to overcome the presumption of negligence by a preponderance of evidence that there was an absence of negligence on his part.

> *Sweeney v. Erving,* 228 U. S. 233, 33 Sup. Ct. 416.

To quote from that decision:

> "The general rule in actions of negligence is that the mere proof of an 'accident' (using the word in the loose and popular sense) does not raise any presumption of negligence; but in the application of this rule, it is recognized that there is a class of cases where the circum-

stances of the occurrence that has caused the injury are of a character to give ground for a reasonable inference that if due care had been employed by the party charged with care in the premises, the thing that happened amiss would not have happened. In such cases it is said, *res ipsa loquitur*,—the thing speaks for itself; that is to say, if there is nothing to explain or rebut the inference that arises from the way in which the thing happened, it may fairly be found to have been occasioned by negligence.

"The doctrine has been so often invoked to sustain the refusal by trial courts to nonsuit the plaintiff or direct a verdict in favor of the defendant, that the application of the rule, where it does apply, in raising a question for the jury, and thus making it incumbent upon the defendant to adduce proof if he desires to do so, has sometimes been erroneously confused with the question of the burden of proof. But in the requested instruction now under consideration the matter was presented in no equivocal form. Plaintiff's insistence was not merely that the evidence of the occurrence of the injury under the circumstances was evidential of negligence on defendant's part, so as to make it incumbent upon him to present his proofs; the contention was that it made it necessary for him to prove by a preponderance of the evidence that there was an absence of negligence on his part. . . .

"In our opinion, *res ipsa loquitur* means that the facts of the occurrence warrant the inference of negligence, not that they compel such an inference; that they furnish circumstantial evidence of negligence where direct evidence of it may be lacking, but it is evi-

> dence to be weighed, not necessarily to be accepted as sufficient; that they call for explanation or rebuttal, not necessarily that they require it; that they make a case to be decided by the jury, not that they forestall the verdict. *Res ipsa loquitur*, where it applies, does not convert the defendant's general issue into an affirmative defense. When all the evidence is in, the question for the jury is whether the preponderance is with the plaintiff. Such, we think, is the view generally taken of the matter in well-considered judicial opinions."

In this case there was no collision, explosion, sudden start or stop, falling object, breaking of any part, nor was there any intervening act of an employe or passenger. The accident happened in the usual and ordinary use of a bath, of stock pattern such as is used in sanitary bath showers in modern American homes (p. 566). There was no storm, and no greater unsteadiness of ship than what is common on a fair day with a brisk sea. And for all that appears from appellant's statement of the facts the accident might as well have happened when the ship was tied to her dock, or at any modern bath, at a hotel, public bath establishment, or private residence. There were no previous accidents, and although constantly in use upon a ship carrying many passengers no complaint had been heard about the bath.

Such an accident raises no presumption of negligence on the part of the ship and does not cast upon it the burden of disproving negligence.

The decisions uphold the statement that proof of injury to a passenger, without more, does not raise a presumption of negligence against the carrier. It is necessary for the plaintiff to show circumstances of such a character as to impute negligence, before the doctrine of *res ipsa loquitur* can be invoked.

13 L. R. A. (N. S.) 602 and cases collected.
29 L. R. A. (N. S.) 808 and cases collected.
1916 (C) L. R. A. (N. S.) 364 and cases collected.
Wyatt & Pac. Elec. R. Co., 156 Cal. 170, 103 Pac. 892.

In order to raise such presumption of negligence it is necessary to establish the fact that the injury was occasioned by the instrumentalities or facilities furnished or negligently omitted by the steamship in this shower bath, as alleged in the libel. Even if the proof of the accident is equal as to the fact that the passenger lost his balance before he got into the shower, the appellant has not made out a case. The burden is upon him to prove what he has alleged in his libel; and since the court below heard the witnesses and inspected the *locus*, the presumption under the rule of law relating to admiralty appeals is strongly against the appellant. Assuming therefore that the appellant and Dr. Simons are equally credible and unbiased (which of course would not usually be presumed),

and that their descriptions differ as to what occurred, neither being corroborated, still the appellant has no right to expect a reversal.

But even if the libellees have, as claimed in the libellant's brief, the burden under the circumstances shown here, of "showing that they exercised a high degree of care and furnished a safe shower bath for the use of passengers," yet this burden is amply sustained. The only witness that may be said to have furnished evidence tending to show that the facilities provided were inadequate was Hackett, whose opinion was on its face entitled to little weight to overcome the potent fact that almost constant use of the bath in all kinds of weather has not brought to light any need for change or any complaint.

The diligence of the appellant's counsel has produced a formidable array of authorities upon the high degree of care required of a carrier of passengers and the presumption of negligence from accidents to passengers. With the principle of these cases we have no controversy, but (as was said by Judge Ross, in *Southern Pac. Co. v. Cavin*, 144 Fed. 348, 351), it is founded upon the fact that in the nature of things the passenger can rarely know the cause of the accident. Where the circumstances show either a want of care of the passenger, or that the possible risk of accident is more open to the passenger than the carrier, so that the pas-

senger is free to act on his own judgment, or when the danger is obvious to the passenger, or the appliance used is at the time under the control of the passenger, the general principle does not apply, and this is particularly true where the appliance in question is not defective, and is simple in character, in common and successful use and is open to the option of the passenger to make use of it or not.

To make the doctrine of *res ipsa loquitur* applicable, there must (as the phrase implies) be something in the facts which speaks for itself, and therefore each case will depend upon its own facts. The doctrine cannot establish a liability where a definite cause is clear on the evidence, for inferences are there excluded because the cause is disclosed as a definite fact. In cases of this sort the fact must be shown to be the result of the defendant's negligence before there can be a recovery.

Where there is no break, or other unusual occurrence arising out of or connected with the operation of the carrier's business, the presumption of negligence does not exist and cannot be assumed without proof.

> *Irvine v. Delaware L. & W. R. Co.*, 184 Fed. 664.

In that case Judge Gray in a fine analysis of the principles involved, cites with approval the fol-

lowing quotation from Thompson on Carriers (Volume 3, Sec. 2756) as follows:

> "It has been pointed out by an able judge, that the presumption which arises in this case does not arise from the mere fact of injury, but from a consideration of the cause of the injury. Thus it was said by Ruggles, J.: 'A passenger's leg is broken while on his passage in the railroad car. This mere fact is no evidence on the part of the carrier until something further be shown. If the witness who swears to the injury testifies also that it was caused by a crush in a collision with another train of cars belonging to the same carriers, the presumption of negligence might arise—not however from the fact that the leg was broken, but from the circumstances attending the fact. . . . As shown by other decisions, the meaning of the foregoing doctrine is, that the mere fact that a passenger has sustained some injury of an unknown or obscure character, proceeding from an unknown or obscure source, while in transit in the carrier's vehicle, does not of itself raise the presumption that the injury proceeded from the negligence of the carrier. The presumption arises from a consideration collectively of the fact of the injury, and of the kind or source of it. The fact of an injury alone is not sufficient. It must be traced to the carrier.'"

The decisions of the Supreme Court referred to on page 81 of appellant's brief are also examined by Judge Gray in the Irvine case, and he shows that misconception has arisen from considering certain language in these cases apart from the facts, and that in these cases there was a distinct act or hap-

pening in the course of the conduct of the business of the defendant, out of the ordinary routine of that business when properly conducted, upon which the presumption of negligence rests.

A very excellent review of the cases, with a discriminating consideration of the limitations of the rule of presumption of negligence in passenger cases is found in Judge Warrington's opinion in *Lee Line Steamers v. Robinson*, 218 Fed. 559.

See also the note in 13 L. R. A. (N. S.), p. 601.

Now, an examination of the citations furnished by the appellant shows that they are confined to instances where the accident was due to derailment or collision, or some cause exclusively under the carrier's control, or a defect in machinery, cars or track, and to circumstances under which injury would not usually occur if due care is used.

Of course if the evidence clearly shows the cause of the accident there is no presumption indulged in.

It is perhaps unnecessary for us again to call attention of the court to the fact that there is no admission in the answer of the injury complained of, as again assumed upon page 83 of appellant's brief, where authorities are cited upon this assumption.

The numerous citations in appellant's brief of cases wherein carriers under circumstances shown therein have been held negligent need not be here reviewed separately. They are cases of the falling

of a berth, or faulty construction of an approach, or the use of a dangerous gangplank, or other negligence on the part of the carrier, without contributory neligence. All these numerous cases serve to show that carriers are liable for negligence. But in each case the negligence is pointed out by the court or found by the jury. After all, each case must stand upon its own facts, and such citations have only a remote bearing.

Here the facts are simple enough and the question is not what some court held upon a different state of facts, but whether this bath can be said to be so faulty as to make the steamship company liable for an injury to one who uses it so carelessly that the proximate cause of the accident was his own lack of common prudence.

III.

The Bath Was Modern and New, and of the Usual Design.

The ship is described as a modern vessel of 8255 tons gross and 4184 tons net, built by Cramp and Sons of Philadelphia. She left that city for the Pacific Coast, January 28, 1915, under command of Captain Ahman who was still in charge of her on February 18, 1916, when this accident happened (pp. 231, 264). The firm mentioned is said by Captain Ahman to enjoy a first class reputation, having built the Kroonland, Finland, St. Louis, St. Paul and quite a number of other large passenger ships; and "they are people that have knowledge of these things, of installing shower baths, bathrooms, and so forth, aboard ships, and know what they are doing." Captain Ahman says there are no other precautions that could be used that he knows of that would make the shower bath more safe. He has had a wide experience as shown by his testimony (pp. 443-4). At another place in his testimony he says the facilities for bathing on the "Great Northern" are absolutely the best he has ever seen. This coming from a man of forty-five years' experience at sea and on many vessels is entitled to some weight, especially when he adds that there are no other precautions which from his observation in connection with shower facilities could be used, in his judgment, to make this shower more

safe. He says the showers are used all the time by the passengers, and no complaints have been made (pp. 275-7). In this he is corroborated by Chief Engineer Morris who testifies that in his experience he has not known of any shower room or compartment that had any other facility or device which he has known or heard of that is absent from this particular compartment (p. 254). At another place in his testimony he says:

> "I have been pretty much all over the world; I was running to Panama for about six or eight years, going out to China for twelve or fifteen years, and the remainder of my time from Alaska to San Francisco, Honolulu. In all the ships I have been in, and in all my experience, I never saw a ship that was better outfitted than the 'Great Northern' of the Great Northern Pacific Steamship Company for both shower-baths and everything else, none whatever."

He says his experience has justified his forming a conclusion about that (p. 437).

He testifies that the Great Northern and the Northern Pacific had carried some 80,000 passengers and the baths were continuously used, people waiting for them, and that no complaint had been made to him as an officer of the company as to the manner of construction or the condition of the shower baths prior to the complaint made to him by Mr. Hutchins, as he had stated (pp. 255-6).

At another place in his testimony he says that they are used all the time, a continuous stream of people using them, and he has not known of any complaint being made that the bath is dangerous. Also that he cannot see himself—he would be the one to suggest an improvement if any was necessary there, and he had never felt the need of doing so (pp. 470-1).

First Officer Wall, whose duty it was to make daily inspections and on finding anything wrong, or equipment broken, to have it attended to and to report it to the head of the proper department, says that he never found anything wrong with this bath or made any report concerning it or noticed anything that led him to think this bath was dangerous in any respect; has never had occasion to make a report concerning any defect in this bath (p. 487).

And likewise Chief Steward T. S. Mills, who has general charge, oversight of the bath-rooms, says that if any accident should happen in the use of the shower baths on the ship, the attention of the purser and himself would be called to it in the natural course of the business on the ship. If it happened inside of the state rooms or showers or baths or on deck, it would be reported to the deck department, the chief officer or the captain. That no complaints have been made about these shower baths (p. 508).

None of this testimony is disputed by any evidence offered by the appellant and from the evidence it may be well believed that Capt. Ahman is correct in saying that the "Great Northern" was built very much upon the same plans as the "Lusitania" and the "Mauritania" as respects shower baths. He says that first class steamers like the "White Star," the "Cunard" and the other big liners on the Atlantic have shower baths and they are all fitted about the same in that line (p. 285).

Mr. Hutchins himself says that the material used in these baths is the same as that used in private houses (p. 158), and Dr. Simons says that the porcelain basins were the regular stock basins that you see in every plumbing store where they sell shower or bath-room supplies. He had occasion to investigate them because he intended to put them in his cottage in Massachusetts and he observed that they are the stock basin; the shower as constructed on the "Great Northern" was the usual modern type of stock basin in every particular. This includes distance from the floor and slope in the basin (pp. 566-7). This testimony may be considered in connection with the statement of the appellant (p. 174) as follows:

> "Q. Can you tell what caused you to fall?
>
> A. Why, I attribute it to the slippery condition of the floor, the slippery condition of the bowl, that is. I don't consider the bowl and

its condition one that I would want to get into again.

Q. I wasn't talking about that. What I want to find out is what caused the fall.

A. The water was running in the bowl, the steward had turned that on. The water was on the surface of the bowl, and there was,—to my knowledge there was no lurch of the ship and no movement on my part. If anything, I was leaning forward instead of upright, if there was any difference, and there was no premonition of it, it was just very quick."

The mere fact that the bath bowl or the bathroom floor may have been wet, and on this account slippery, would not make out a case of negligence in ship or owners. Thus in *The Anchoria*, 77 Fed. 994, where the claim was that the passenger was injured by being scalded by the splashing of some hot gruel from a bucket in which the steward was supplying it to the steerage passengers, and the court considered the circumstances of his slipping on the wet floor, it was said:

"But even if the steward slipped upon the wet floor, I do not think this makes out a case of negligence in ship or owners. There was nothing lacking, or improper, or unusual in the equipment; and there is no evidence of the lack of ordinary care as respects that part of the steerage. Where a water cooler is placed as customary for the common use of children and steerage passengers, it is not to be supposed that there will not be some water on the floor. That this happens is no evidence of negligence

in the ship. Nor is a little water upon the floor naturally any such source of danger, as in itself to constitute evidence of negligence, or to require an attendant to keep the floor dry, or to demand a wholly different arrangement for the water cooler. No previous similar accident from such a cause is in evidence, or known to the court. It was not to be reasonably anticipated. More or less water on deck is a constant attendant of sea voyages; but this does not ordinarily cause slipping by any of the ship's company, or accidents therefrom. The steward appears to have been a competent and careful man; and the case is, I think, one of accident proper, and not one involving any legal fault in the ship or owners."

IV.

Rubber Mats or Gratings Not Necessary Nor Useful.

It has been claimed in this case by the appellant that there should have been a rubber mat on the floor either of the basin or of the bath-room. It is common knowledge that a rubber mat might itself be dangerous especially if wet with soapy water, and there is some testimony that it would be more so than porcelain (Testimony of Mr. Morris, pp. 258, 471). And also that rubber mats would be unsanitary. If the accident happened as appellant asserts, by his feet slipping from under him when in the bowl or basin, then a mat on the bath-room floor would not have prevented it.

Dr. Simons testifies:

> "Q. Now, I will renew my question and ask your opinion as to the use of a rubber floor or other floor of that type in connection with a bath-room used as this was, generally on a ship? . . .
>
> A. I would regard the principle of sanitation more important on a steamship than I would in my home because of peculiar conditons on the steamship. I think it is much more difficult to keep a steamer in a hygienic condition than it would be in your home.
>
> Q. Would the fact, Doctor, of the motion of the boat in rough weather qualify your opinion as to the necessity of having rubber floor coverings, as a matter of safety in spite of your opinion on the question of sanitation? . . .

A. Well, that is a pretty hard question for me to answer. I have traveled on a great many steamers, but I don't remember seeing rubber mats on any of them, and I don't remember hearing of anyone falling in the bath. This is the first time it has been brought to my attention.

Q. Would you regard the use of rubber mats on the floor of a bath-room on a steamship such as the 'Great Northern' as sanitary?

A. No, I would not regard them as sanitary as the tile floor.

Q. In your opinion would any rubber mat provide against slipping unless it was a mat which covered the entire floor?

A. I should say that if the mats were of good size they would help considerably. I say good sized in proportion to the size of the room.

Q. But a small mat would provide practically no protection?

A. No.

Q. You say that you have traveled extensively and that you have never seen rubber mats used on bath-room floors on shipboard?

A. I never have.

Q. From your experience how would you regard the equipment of this shower bath-room, its showers, including its basins and general appurtenances, so far as you observed them on the day of the accident?

A. I would say they are first class." (pp. 571-3.)

The appellant called a single witness to give an opinion that mats or gratings should be provided.

This witness was Alfred Hackett, chief steward of "Sierra" of the Oceanic Steamship Co. (p. 345), who has been with that company thirty years as storekeeper, second steward and chief steward. He mentioned but two ships that he knew of that had shower baths, the Sierra and the Sonoma of that line. He had no experience excepting on the ships of that line, but in response to questions by the appellant's counsel and against objection he stated that a bath of this description should have a wooden grating or a bath towel to stand on to protect the passenger from slipping. He also stated that "we protect our passengers by having a wooden grating bath-mat, and also on the outside dressing-room when he comes out of the shower he stands on this platform of wood with a bath-towel on it to prevent him from slipping while he is wiping himself and dressing himself." (p. 356.)

But we submit that this opinion and comparison, if admissible at all, is insufficient to overcome the mass of evidence to the contrary. The practice upon the two steamers of the Oceanic line is not shown to have been known to the Great Northern Pacific Steamship Company or the officers of the "Great Northern." The practice mentioned by the witness is not claimed to have been so general as to be common usage, and other witnesses have said that they have traveled on many ships and have not known the use of rubber mats in such baths, and they do

not mention having seen or heard of such gratings. The method employed is manifestly more unsanitary, and nothing in the testimony shows there is such necessity for the use of gratings as would overcome the undisputed evidence of frequent and constant use of the "Great Northern" shower baths without accident, although not provided with such gratings.

The witness Hackett could hardly qualify as an expert. He did not notice the showers on the Union Steamship Company vessels nor others, nor know anything of Atlantic vessels, as he had not been on the Atlantic for 35 or 40 years. He admitted that the most he could do was to tell the conditions which existed on his own vessel and said that he had never made a study of construction. He also said that he had never seen the showers used on the "Sierra" without the gratings and of course therefore could not speak from experience as to the use in practice of such shower bath-rooms as are on the "Great Northern." (p. 345.)

This is the only evidence in the record that is relied upon by the appellant to prove that mats or gratings should have been supplied in the basins.

That the surface of a wet rubber mat would be slippery in a shower bath basin and a real danger in itself seems plain enough, and that such a mat would have a tendency to slide on tiling or in a

porcelain bowl may be assumed as common knowledge. An illustration is found in a case in the Second Circuit, cited by the appellant, where it was held that the mat at a doorway being too small to properly fit the space provided for it, the steamship was liable to a passenger for personal injuries occasioned by the mat slipping.

Mohns v. Steamship Co., 182 Fed. 323.

Had a slipping mat been placed in this basin accidents from this source would be frequent for manifestly they could not be made so they would not slip.

Or the mat might have caused the passenger to trip and fall as in *The North Star,* 169 Fed. 711.

A mat is a simple contrivance, and its usefulness in this particular bath-room, or as claimed in the libel in the basin of the bath itself, is a matter of judgment or opinion. Certainly under the evidence there is nothing to justify holding it negligence to have formed and acted upon the opinion or judgment that a rubber mat should not be used. It would be more or less of a trap to the unwary in such a place on shipboard, and if used would give just ground for complaint on that account as well as for sanitary reasons.

V.

Facilities to Safeguard Against Accident.

Some responsibility must rest upon the shoulders of passengers of mature years, like Mr. Hutchins, who may be expected to use their judgment upon what is obvious.

In *Savage v. New York, N. & H. Steamship Co.*, 185 Fed. 779, a passenger was injured by falling over an obstruction on the promenade deck. The obstruction was obvious, and the light was ample so that by use of ordinary human faculties she could have noted the obstruction and have avoided the accident; and the court held that which is obvious to one of ordinary intelligence and in the possession of physical senses does not require special warning.

The steamship company is not an insurer, and some risks of travel must be assumed by the passengers. Such ship motion as was incidental to proper operation, is assumed by the passenger, and would not charge the appellee.

Chesapeake & Ohio Ry. Co. v. Needham, 244 Fed. 146.

The libel alleges that "there was no provision by means of rails or otherwise for grasping or holding on in case of slipping." (p. 16.)

Mr. Hutchins insisted throughout the trial that a certain grabhandle that is shown by the photo-

graphs at the back of the shower bath compartment was not there at the time of the accident, and we will devote section VI of this brief to the evidence upon that point, to show that in this he is mistaken.

Passing that for the moment, we will here attempt to show that a person wishing to use the shower in question might, with common prudence, have taken advantage of a number of other visible, possible, and convenient facilities, and so avoided any chance of accident.

Mr. Relf, the claim agent, under whose directions the photographs were taken, and who gives a description of the shower bath from actual measurements taken by him, was asked:

> "Q. Entering the shower bath what facilities present themselves to a person desiring to take a bath to safeguard from falling?
>
> A. There is a marble slab on his right hand, a rod which is above him about 72 inches from the floor; the three pipes that are on his left hand; the first pipe is a cold water pipe; he could catch hold of that; and then by reaching over to the grab on the back wall of the shower bath, I would say that would be the best means of protecting himself or steadying himself while stepping into the receptor.
>
> Q. How about the door-knob that you speak of; is that available?
>
> A. It is available; it could be used for that purpose.
>
> Q. The basin of the bath you say is about 30 inches square?

A. The outside dimensions is 30 inches.

Q. Where is this overhead pipe that you speak of, 72 inches above the floor; is that at the forward part of the bath as you enter?

A. That is right at the opening.

Q. What about the curtain that hangs there —is there a curtain?

A. Yes.

Q. That slides on rings, does it?

A. Yes.

Q. What would you say, Mr. Relf, as to whether or not a person could if he wished take hold of the curtain itself?

A. Yes, he could.

Q. What material is that curtain made of?

A. It seems to me it is a cloth treated in some way to make it waterproof; almost a coating of rubber on it; I do not think it is rubber; it is not a rubber curtain." (pp. 456-7.)

A somewhat similar enumeration and description is given by Chief Steward Mills who had general charge of these baths. (See page 506.)

Slab: Mr. Jamieson, a passenger, was asked if it would be practicable for a person using the bath to take hold of the slab to steady himself if he found it necessary to steady himself, and answered that a person could so steady himself on going into the bath. (p. 480.)

Chief Officer Wall said as to this slab:

"Well, in stepping into the shower, it seems to me the first thing that a person would take

> hold of; naturally, a man will put his hand up and touch that slab or hold on to it in stepping into it; I think that nine men out of ten would do that without any conscious effort or thinking about it." (p. 485.)

Captain Ahman says the slab is one and a half inches thick, and is available to take hold of (p. 446).

This slab is plainly shown on Claimant's Exhibit No. 1 at the right of the picture. (p. 543.)

Door Knob: On approaching the bath, there was on the left hand side a brass door knob which was conveniently near and forms a convenient support against slipping. This is shown in Claimant's Exhibit No. 2, (p. 544). (See testimony of Capt. Ahman, p. 441; Morris, pp. 241, 246, 467; Wall, pp. 484, 493.)

Curtain: There was a heavy curtain in front of the bath suspended by rings from a strong rod over the entrance. This curtain was a cloth treated to make it waterproof, but was pushed to the side at the time when the appellant was making use of the shower bath, as he testified (p. 176). It hung, however, conveniently and might readily have been availed of as a means of support had the appellant cared to make use of it. (See Claimant's Exhibits Nos. 2 and 3 where the curtain is shown on the righthand side of the pictures; see also testimony of Relf, p. 463.) Chief Engineer Morris says these

curtains are strong enough to hold the weight of a person. (p. 246.)

Curtain Rod: And moreover the rod or bar just mentioned afforded excellent support and protection, as it was heavy and strong enough for the purpose. The appellant (Br. p. 53) alludes to the absurd opinions of the officers that this curtain rod was available for this purpose. It is well shown in Claimant's Exhibit No. 3 at the top of the picture and is less clearly shown in Claimant's Exhibit No. 1 (pp. 545 and 543). Chief Engineer Morris says this rod is one and one-half inches in diameter, secured by bolting on the marble slabs and will sustain the weight of a man of his own size, over two hundred pounds, easily. (p. 299.) And the passenger Lowenthal, said that in using the bath every morning he made use of this rod. (p. 501.) (See also passenger Jamieson, deposition, p. 480; Wall, p. 491; Metzler, p. 216).

Water Pipes: Again, the water pipes at the lefthand side of the shower bath and firmly attached to the wall, afforded excellent means of support. These are clearly shown in Claimant's Exhibits 1, 2 and 3 (pp. 543, 544, 545). These pipes were considerably longer than any grab handle or railing. Mr. Wall says:

> "These water pipes are about the height, we will say, of five feet, I imagine, from the floor, and quite easy to be taken hold of in en-

> tering the bath; in case of a man losing his balance, I think it would be the first thing he would catch hold of with his left hand." (p. 485.)

They stood out from the wall about two and one-half inches (Morris, p. 245), although the appellant thought they were so close to the wall he could not get his fingers behind them. (p. 126.) The outside or nearest pipe was a cold water pipe. (Morris, p. 321.) Mr. Relf, p. 457; Mr. Metzler, p. 217, and Wall at pp. 491, 492, all testify that these pipes were so located as to be of use as a support.

Valve Handle: The valve handle or lever at the bottom of these pipes would also afford a ready hold for anyone on entering the compartment. (Morris, p. 467; Jamieson, pp. 478-481; Stoy, pp. 533-5.) This valve handle is clearly shown in each of the photographs and particularly in Claimant's Exhibits 2 and 3, pp. 544 and 545. The passengers Jamieson and Stoy both said they relied upon this handle when using the bath.

In view of these facts, which are undisputed and which the photographs verify, it would seem the claim of the appellant that the shower bath was not provided with sufficient facilities to enable a person to take hold and safeguard against slipping, is unfounded. The court viewed the matter otherwise after personal examination, and we may assume that the finding on a fact of this kind will be

accepted on appeal in an admiralty case. Common prudence would require a person in stepping into a marble porcelain bath to make use of such facilities when they were plainly apparent. In discussing these facilities we have so far purposely omitted reference to the grab handle at the back of the bath.

Controversy arose respecting this particular facility on the trial, due to the fact that Mr. Hutchins claimed that there was no such grab handle, and he was to some extent corroborated by the positive testimony of two witnesses and the negative testimony of two other witnesses who had no recollection of seeing it. We now propose to show, however, that the overwhelming evidence establishes the fact that this grab handle was in place, as shown by claimant's exhibits Nos. 1, 2 and 3, pages 543, 544, 545, firmly attached to the marble slab forming the back of the bath, in plain sight, and affording a firm hold. This handle had an inside measurement of about six inches and was nine inches over all, as testified by the man who installed it (p. 520).

The assertion is made by appellant in his brief (p. 73), that all the disinterested witnesses in the case either swear positively that the handle was not in place at the time of the accident or express a doubt as to its being there. But this statement, to put it mildly, is a mistake.

VI.

The Grab Handle at the Back of the Bath.

In the first place before the Great Northern was fitted out for the Honolulu service, a requisition was made out by the chief steward of the steamship, Thomas S. Mills, dated January 20, 1916, to have grab handles installed in all shower baths on this ship. (See his testimony, pp. 324 to 331.) Mr. Mills produced the original requisition. (See Libelees' Exhibit No. 1, pp. 59-62.) This is Great Northern Requisition No. 27 for repairs to be made at San Francisco. The date will be found at the end of the document at page 62. In the description of articles to be furnished is the following: "Grab Irons in all Shower Baths." (p. 59.) Mr. Mills testifies that after the completion of the work he examined the bath personally and knows that the grab handle in this particular shower bath was in the location as shown on the photographs on January 25, 1916 (pp. 325-6). He also says that the work was done by a San Francisco firm, Messrs. Muir and Symon, and their bill is now attached to the requisition; that the bill was marked by him in the left-hand corner, "O. K., T. S. Mills, chief steward," on January 25, 1916 (p. 328), after he personally checked the items and inspected the work, and the bills were vouchered for payment on February 21, 1916 (p. 327). On the day of the accident

he was in this bath room and the handle was there at that time (pp. 329-331).

The bills of Muir & Symon are found at pages 51 to 59. The job was given the number 86 in their shop.

Reference to these bills shows they are dated January 25, 1916 (see p. 51), and shows, among others, the following item: "Grab Bars in all Shower Baths." (p. 53.)

That the grab handle was placed in this shower bath prior to the accident, is shown by the following witnesses:

W. J. Tomlin (p. 512) testified that he put these handles on the baths in January, 1916, and to fix the exact dates produces his time cards made out at the time. (See pp. 513-4, and also see Claimant's Exhibits 5 and 6, set out on page 548.) In Exhibit No. 5 is the item "drilling marble in shower baths, using electric drill 4 hours." This is on job 86, which was the shop number for all these repairs. Likewise at the bottom of Claimant's Exhibit No. 6 is the item "handles in shower baths, 1 hour." This is also on job 86.

The time cards were made on finishing the day's work, and were turned into his employer's office. They are in the witness' handwriting and are dated the 24th and 25th of January, respectively, and the signature thereon is his own signa-

ture. They were made up for the purpose of showing the time spent on the different jobs, whether aboard boat or ashore, so that the firm could charge up in the office the time and material on the job (p. 514). He is positive by reference to these time cards that the time he did the work was on January 24 and January 25, 1916 (p. 514).

Effort by appellant's counsel to show that the work had been done on the sister ship, the "Northern Pacific," instead of on the "Great Northern," failed, as the witness Tomlin said that the cards were certainly for the work done on the "Great Northern," and that the initials "N. P. S. S." on Claimant's Exhibit No. 5 were not in his handwriting. This particular job on the "Great Northern" had the shop number, and was called Job No. 86, and this number appears on the bills and requisition (see p. 518).

In appellant's brief the statement is made that "The court below laid great stress upon the evidence of this witness but the facts show that he was probably mistaken, and point strongly to the work having been done on the 'Northern Pacific' and not on the 'Great Northern.'" On the contrary the work on the "Northern Pacific" of similar character bore a different shop number and was done at a different pier and some weeks after the date of these requisitions, time cards, bills and book entries that are undisputed, and the sworn testi-

mony of this witness that the initials "N. P. S. S." on the time cards was a mistake is corroborated by other witnesses as well as by the records, and is not disputed by any witness.

Then there was the testimony of J. B. Switzer, foreman for Muir & Symon, ship fitters, who testified that he received a duplicate of the requisition from his employer, Mr. Muir, who made duplicates of it and handed witness one of these duplicates. He says that he went down to the boat and saw what was wanted and ordered the handles made at the foundry, and instructed Mr. Tomlin to drill the holes and have everything ready so when the handles came they would be ready to be put on, at the place. He testifies positively that the handles were placed in January at the date shown on the time cards. The work was performed under his direction, and it was his duty to see that the work was ready to be put up and to get the work under way, and also to go over the work after it was finished and see that it was done properly (p. 523).

This testimony is also corroborated by Miss Katie Schnieder (p. 527). Miss Schnieder was bookkeeper for Muir & Symon. She says that the job on repairs on the "Great Northern" was known in the office of Muir & Symon as Job No. 86 and all of the bills and vouchers bore that number. She produced certain voucher sheets made in her own handwriting covering the work on the steamship

"Great Northern" included in the requisition above referred to. On request the witness marked with a check mark the items on January 24 and January 25 relating to these handles. The sheets are the Voucher Sheets, Claimant's Exhibit No. 7, set out in full, beginning at page 549. At about the middle of page 549 is the item under date January 24, "W. Tomlin, Drilling Marble in Shower Baths, Using Elec. Drill," and at the foot of page 550 under date January 25, is the item, "W. Tomlin, Handles in Shower Baths." This witness made copies of the requisition for this work and offered the same in evidence (Claimant's Exhibit No. 8, p. 552), being a list of repairs and improvements in steward's department in steamship "Great Northern," the next to the last item of which on page 553 is "Grab Bars in all Shower Baths." This requisition also bears the number 86.

The items referred to by this witness in Claimant's Exhibit No. 7 were written by her from day to day after the time cards were turned in for the items, and the items concerning the drilling marble in shower baths, January 24 and 25, were placed by her on this exhibit on different days. She also testified that the work there shown was not done for the "Northern Pacific" as the work for that ship was done under a different order number, two or three weeks later (pp. 532-3).

Further corroboration is found in the deposition

of Samuel Symon (p. 536) of the firm of Muir & Symon, who says that the work of placing these handles in the shower baths was done from January 20 to January 25, 1916. He attended to the purchase of these handles himself. He had the pattern-maker at Garratt's make a pattern. He got the handles cast at Garratt's brass foundry (p. 536). This was W. T. Garratt & Co. of San Francisco. That firm billed on Muir & Symon for the same. The receipted bill is Claimant's Exhibit No. 9 (p. 554), and is dated January 25, 1916. It shows among other items, "10 nickel plated pulls" at the price $5.92, and the item is marked with the job number 86. He also purchased the screws or bolts that were necessary in fastening these handles from C. W. Marwedel. The bills for these are Claimant's Exhibit No. 10, set out on pages 555 and 556, on which pages will be found the items for 50 R. H. brass screws and 16 R. H. brass wood screws. These items also bear the job number of the Muir & Symon job, number 86, and the bills are dated January 24-25, 1916. The witness recalled in connection with these bills that the foreman on the job (Switzer) told him that he did not have long enough screw fastenings, that he only had screws that would go in half an inch and "asked me if he should let it go, and I said no; I immediately turned around and went up town and got 16 more screws one-half inch longer to make them more secure."

(p. 538.) These are the 3½-inch screws in the second of the Marwedel bills, dated January 25, 1916 (p. 556). The witness testifies that bill was rendered to the Great Northern Pacific Steamship Company by his firm, dated January 25, the date the job was finished. The firm also did similar work on the steamship "Northern Pacific" about a week after, and this job was No. 140. The witness personally knows that these grab handles were put on at the time mentioned (p. 541).

Further corroboration is found in the testimony of bath steward Gould who had charge of the shower baths on B Deck of the "Great Northern." He testifies positively that the handle was in the shower room of the C baths prior to the time Mr. Hutchins was hurt. Before the time for the ship to sail to Honolulu the witness visited the shower bath room on the C Deck. He says positively that these handles were in place in this shower bath before the ship sailed, and he states the reasons for knowing this which reasons are most convincing (p. 293-4).

Chief Engineer Morris inspected the shower bath the next day after the Hutchins accident and was absolutely sure that the handle was there (p. 242). He says that Mr. Hutchins told him the evening before that he had slipped and hurt his shoulder, and that he "took a look at the place." He also says that Mr. Hutchins did not mention any han-

dles or any method of holding on at all, just the fact that the base of the bath was built with a round corner and it should have square corners. (p. 244.)

Capt. Ahman testifies that he is positive the grab handle was on the back wall of the bath at the time of Mr. Hutchins' accident, and he explains circumstances that tended to fix in his mind the time when the work was done in conjunction with some other work upon the ship. (pp. 271-2.) He himself saw the man putting up the grab irons.

Further corroboration is found in the testimony of W. H. Metzler, who was special agent of the company, employed upon the ship. It was his business to make an examination after an accident, and on learning of the accident he went down immediately and examined the shower bath. He testifies positively that the grab iron was in place at that time (pp. 213-214).

Chief Officer Charles Wall testifies to similar effect (p. 483) and says that it was his duty to make inspections every day, "if we find anything wrong, or equipment broken, we have it tended to, and report it to the head of the proper department." (p. 487.) He says that the handle was as shown upon the photographs, Claimant's Exhibits Nos. 1, 2 and 3, at the time of the accident.

Claim Agent Relf testified that he made an examination after the accident on the arrival of the

ship at San Francisco on her return voyage, and found the grab handle as located. When he heard that Mr. Hutchins made claim against the Steamship Company on account of having received injuries, he investigated for the purpose of ascertaining the facts in connection with the accident (p. 454), and on return of the ship from Honolulu after February 18, 1916, he made an examination of this shower bath. He has seen the shower bath as often as once a month since that time (p. 459).

Dr. Robert J. McAdory corroborated this at page 383. He saw the shower bath room the day Mr. Hutchins fell, sometime after the accident. He says positively that the grab handle was there on that day.

This is further corroborated by the testimony of Sam B. Stoy, a passenger, and disinterested witness, who used the bath on this same voyage. (p. 535.)

The foregoing evidence seems to be positively overwhelming proof of the fact. It comes as near demonstrating absolutely that the grab handle in question was in place at the time of the accident as is possible for human testimony.

However, Mr. Hutchins testified repeatedly that there was nothing whatever for him to take hold of. (pp. 76, 77, 79, 82, 127, 165.) Mr. Hutchins went further and said that as long afterward as the

middle of March he visited the vessel when it was again at Honolulu, that he went on board the ship to see if any handles or projections were there and that he was positive none were there even then, and that no handles were there on two other visits after that when he went again on board for the same specific purpose. (pp. 96, 127, 164, 165.) The credibility of this testimony, however, is much impaired from the fact that Mr. Hutchins also testified in the same connection that there were but two water supply pipes, on the left wall of the compartment (p. 159), and these he said were tight against the wall and there was no room for a man to take hold of the pipes in his hand as the fingers could not pass behind them. (pp. 78, 126, 127.)

Reference to the photographs (Claimant's Exhibits 1, 2 and 3), will show that these three pipes are parallel, with the center one most prominent, and the photographs also show that these pipes were sufficiently out from the wall for a man to put his hand around any of them, as indeed is testified to by other witnesses. (Metzler, p. 216; Morris, p. 245.)

Mr. Hutchins, however, was supported in his testimony that there was no grab handle at the back of the bath by a former room steward on the ship, named Lefebre, who at the time he testified was no longer employed upon the ship. His employment on the ship gave him no

duties in this bath-room, but he was room steward in the Chief Engineer's room. He testified that when Hutchins came on board the steamer the second trip after the accident, in March, he went with him into the shower compartment on C Deck and saw that there was no grab handle on the wall. (Lefebre deposition, p. 597.) The unreliability of this witness, however, is distinctly shown by his cross-examination, and furthermore by his being directly disputed on material points in his testimony by Chief Engineer Morris, and the weight to be given to his testimony, taken as a whole, is very slight.

The witness had said that he went to Chief Engineer Morris on board and told him of the visit to the bath-room made by himself with Hutchins, and that thereupon Morris went with him to the same bath compartment and verified the fact that there was no such handle there (pp. 597-8). This is most explicitly and absolutely denied by Morris (pp. 260, 304, 305, 608-9).

That this testimony of Lefebre is a story manufactured out of whole cloth will be evident from a comparison of his cross-examination with the testimony of Mr. Morris beginning at page 607 in which the latter completely disposes of his false testimony. (See also Morris, pp. 260 and 304.)

However, in addition to Lefebre, Hutchins was corroborated by the witness Wescott, a citizen of

Honolulu. Mr. Hutchins stopped with this witness at his house. The witness said that he visited the ship together with a Mr. Bicknell, knowing of Hutchins' accident, but not at the latter's request (p. 211); and that there was no handle there at that time, which was in March, 1916 (p. 205). It is noticeable in connection with this witness' testimony, however, that the Mr. Bicknell referred to was not called to corroborate, nor was any explanation given of the failure to produce him, a failure which under the rules of evidence raises a presumption against the appellant on this point.

The claim of Hutchins in this respect may also be said to have been negatively supported by the testimony of two of the appellee's witnesses who were passengers and who used the bath-room. Witness Lowenthal did not remember any hand-hold on the marble wall at the back of the shower, but he said that in using the shower bath he faced outward so that his back was to the back slab and he held on to the rod over the front. He did not say there was no grab handle there, and all that his testimony in this respect amounts to is that he could not remember (p. 503). And the witness S. W. Jamieson, who used this shower at least three times on the same trip to Honolulu, and also on his return trip, said that he could not say as to whether it was there or not at the time, as he had no occasion to use it (p. 481).

To summarize, therefore, as to this grab handle, we have at least 12 witnesses saying that it was there and 5 witnesses either saying that it was not there, or that they did not notice it. We have the strong documentary evidence supporting the testimony of the men who actually placed it there. In relation to this the trial court said:

> "It is a well-known rule of law that affirmative statements are entitled to more weight than negative, even when the makers of the statements are equally creditable, equally disinterested and equally certain and positive that their statements are true. A witness may swear positively that a hand-hold was not on the wall of a compartment at a certain time and think his statement is true, and yet it may be untrue; he may not have observed the hand-hold; but when a witness swears positively that a hand-hold was on a compartment at a certain time, that he saw it and knows it was there, if his statement is untrue, no such explanation of it can be made." (p. 657.)

In leaving this topic we will say that the somewhat full review of the evidence bearing on the presence of this handle in the shower bath has seemed to be called for because of the claim made by the appellant on the trial and in his brief, although it has seemed that in view of his admission that he did not have his glasses on and could not see very well without them he would not have seen the handle anyway (p. 166), and if his own story is to be accepted and he had his arms under the

falling stream feeling the water when he was stepping into the basin, and did not attempt to find anything to take hold of before putting his feet in the basin, a grab handle would have been of little use to him.

VII.

The Claim For Damages.

The appellant made large claims for losses in his business by reason of being obliged to remain in Honolulu on account of the accident. His proof on this subject is very meager and on cross-examination and by the testimony of independent witnesses these losses were shown to be imaginary.

We will first discuss his claim for general damages on account of pain and suffering. Apparently he did not consider his injury very serious. He was not confined to his bed, and he followed his usual habits about the ship, and after landing did not allow it to interfere with his movements, except that he went occasionally to the doctor. When first apprised of the accident the ship's physician, Dr. McAdory, advised him to lie down, but he got up as soon as the doctor's back was turned, dressed and went down to breakfast. He took his breakfast at his usual place at the table. (McAdory, pp. 373-4.) He met the doctor on the ship every day but he did not think it was his business to ask him to make any further examination and told the doctor he felt fairly well. (Hutchins, pp. 162-3.)

Arrived at Hilo, with a day to spend from 8:30 A. M. until midnight, he made no attempt to see any doctor at Hilo. (pp. 87, 88, 163.) Although testimony shows that three doctors at least reside there (Morris, p. 309). In fact, he went out to the Olaa

plantation for the day (pp. 108, 164), and the evidence discloses that he went there on a business errand to further negotiations for a desired molasses contract.

Although his counsel sought to show that neither the captain or officers paid him any visits or attention (pp. 87, 96), he himself admits that he did not report the accident to the captain (p. 164). There was another doctor on board and he was satisfied merely to have some advice from him. (p. 94.) On the evening of the accident he presided as a judge at a mock divorce trial to the entertainment and edification of the passengers (pp. 87-8). From various circumstances shown in the case he seems to have suffered little and to have conducted himself as usual and without particular regard to his injury.

Now as to special damages for interference with his business, his claims in this respect were thoroughly discredited and he is shown to have been actively engaged in prosecuting his business during the period of his stay on the Islands.

His business at Hilo was to arrange for putting in foundations for a storage tank. He employed the men to take charge of it, and arranged for contracts for the leveling of the site. (Hutchins, pp. 106-7.) He claims he was in a hurry to get back to San Francisco, but although his bandages were off

by March 18 or 20, he did not sail until April 5 (pp. 119-121), and it appears that he was staying on purposely to transact business which he claims was his principal business, viz.: the purchase of molasses. Honolulu is one of his principal sources of supply and he went there for that purpose (pp. 102-4). The evidence also shows that throughout March and April he was still negotiating for molasses contracts, and even opened new negotiations in April (p. 111). As a result of these negotiations he subsequently obtained valuable molasses contracts from F. A. Schaeffer & Company, Limited, and Castle and Cooke, Limited (Waldron, pp. 412-4). Efforts to obtain contracts from Alexander and Baldwin in March were unsuccessful (p. 406). Later on he returned to Hawaii to complete his business (Hutchins, pp. 112-115). When he cashed in the return coupon of his steamer ticket he gave business reasons as preventing him from making the return trip as planned and he said nothing about the accident preventing him from returning (see testimony of Waldron, p. 412, Waterhouse, p. 406). His salary as manager of his Land Company was not interfered with. He claimed important contracts at San Francisco were interfered with by his enforced absence, but failed to specify any of them or show any upon which damages could be considered (pp. 114-15).

VIII.

Liability for Negligence of Ship's Physician.

Dr. R. J. McAdory was engaged by Marine Superintendent Wiley after careful inquiry into his qualifications and upon strong written recommendations of W. H. Avery, Assistant General Manager of Oriental Steamship Company; Philip Mills Jones, Secretary of the Medical Society of the State of California; and E. Anderson, Master of Steamship "Honolulan." (Libelee's Exhibits 2, 3 and 4, pp. 62-65.) He had a certificate from the secretary of the Medical Society of the State of California that he was regularly licensed, a graduated physician favorably known.

The testimony of Mr. Wiley shows the investigation made as to his qualifications and competency. (pp. 635-643.) Besides talking with the applicant and getting his statement of his experience and considering his written credentials, he talked with Mr. Cook who gave him a very good recommendation. Captain Wiley testified:

> "Dr. R. J. McAdory made a written application to me for the position, stating what ships he had been in. He mentioned the Toyo Kaisha Company, commonly called the T. K. K. Company; also presented letters from the Palace Hotel and from the Medical Society of California and from Captain Anderson of the S. S. 'Honolulu.' Personally I was very well acquainted with C. W. Cook, the Pacific Coast Manager of the American-Hawaiian Steam-

ship Company, the owners of the S. S. 'Honolulu,' and I personally went to Mr. Cook's office and asked him about the record and services of Dr. McAdory while in their employ on the S. S. 'Honolulu,' and he gave me a very good recommendation of him, stating that his services had been entirely satisfactory. Mr. Cook has been connected with the American-Hawaiian Steamship Company as their Pacific Coast representative for a period of practically ten years to my knowledge. Mr. Black of the Bank of California in San Francisco, also came to me recommending Dr. McAdory, stating that he, Mr. Black, had been a passenger on the S. S. 'Honolulu' on a trip from San Francisco to New York, and that he could recommend Dr. McAdory very highly as a ship's surgeon. He stated that Dr. McAdory had attended to himself and his folks and that he felt that the doctor was a very reliable and competent man. Both of these gentlemen being personal friends of mine, I took their recommendations to a much greater degree than one ordinarily accepts the usual recommendation. I also asked Dr. McAdory if he had a certificate permitting him to practice in California, or a license for California, and he answered in the affirmative.

"I think the application referred to in this answer is in the files of the marine superintendent's office at Pier No. 7, San Francisco, California." (pp. 636-7.)

Captain Ahman and Chief Engineer Morris, as well as Dr. McAdory, supplement this evidence (278-81; 313; 360-8), and there is no attempt to dispute it in this record. The evidence shows that the doctor had a good training and a wide range of

experience of twenty years, and that no complaints or criticisms had been made about him.

Errors of judgment of this doctor would not render the vessel liable.

Without doubt the treatment of Mr. Hutchins by this doctor was such as he believed to be proper, and in fact the treatment under the circumstances of the case may well be claimed upon the whole evidence to have been proper. But it seems unnecessary to go into this subject and to examine the testimony, in view of the well settled rule of law that governs in cases of this character.

Apparently the appellant in his brief confuses the question of liability for furnishing an incompetent physician with the question of liability for mistake of judgment or wrong treatment of a particular case. The physician himself would not be liable for an honest mistake in diagnosis or treatment, much less the steamship. The exact character of the injury was obscure and it required X-ray photographs to determine that the neck of the humerus in the shoulder joint was broken, and that there was more than a contusion, or wrenching of the joint.

The statute requiring certain steamships to carry a duly qualified and competent surgeon or medical practitioner seems to have no application.

There is no claim in this record that this steamship was bringing in emigrant passengers.

22 U. S. Stat. 186, Sec. 5.

U. S. Comp. Stat. (1916), Sec. 8002.

The City of St. Louis, 238 Fed. 381.

But the record shows that all the regulations of that statute were observed and a surgeon or medical practitioner was employed and was carried on the ship's articles, and hospital accommodations and medicines were provided.

The responsibility of the ship, whether imposed by law or by voluntary assumption of the duty of furnishing a doctor on board, would go no further than to require reasonable effort to employ a competent man. The errors or mistakes or negligence of a ship's doctor in caring for a passenger are not imputable to the ship where it was not guilty of negligence in selecting him.

The Napolitan Prince, 134 Fed. 159.

Allen v. State Steamship Co., 132 N. Y. 91; 30 N. E. Rep. 482; 28 Am. St. Rep. 556; 15 L. R. A. 166.

O'Brien v. Cunard Steamship Co., 154 Mass. 272; 28 N. E. Rep. 266; 13 L. R. A. 329.

Laubheim v. Steamship Company, 51 N. Y. Super. Ct. (19 Jones & S.) 467, and 107 N. Y. 228; 13 N. E. Rep. 781; 1 Am. St. Rep. 815.

The C. S. Holmes, 209 Fed. 971.

And this is the rule of law applicable to other carriers.

Secord v. St. P. M. & M. Ry. Co., 18 Fed. 221.

We quote from *Allen v. State Steamship Company*:

> "When the ship-owner has employed a competent physician, duly qualified as required by the law, and has placed in his charge a supply of medicine sufficient in quantity and quality for the purposes required, which meet the approval of the government officials, and has furnished to the physician a proper place in which to keep them, we think it has performed its duty to its passengers; that from that time the responsible person is the physician, and errors and mistakes occurring in the use of the medicines are not chargeable to the ship-owner; and that no different rule is applicable to such mistakes as are the result of improper arrangement in the care of the medicines than to those which are the result of errors in judgment. The work which the physician does after the vessel starts on the voyage is his, and not the ship-owner's. It is optional entirely with the passengers whether or not they employ the physician. They may use his medicines or not, as they choose. They may place themselves under his care, or go without attendance, as they prefer, and they determine themselves how far and to what extent they will submit to his control and treatment. The captain of the ship cannot interfere. The physician is not the ship-owner's servant, doing his work and subject to his direction. In his department, in the care and attendance of the sick passengers, he is independent of all superior authority except that of his patient, and the captain of the

ship has no power to interfere, except at the passenger's request. These views find support in *Laubheim v. DeKoninglyke N. S. M. Co.,* 107 N. Y. 229, and *O'Brien v. Cunard S. S. Co.,* (Mass.), 10 R. R. & Corp. L. J. 309. The first case arose before Congress had legislated upon the subject, but it was said in the opinion that 'if, by law or by choice, the defendant was bound to provide a surgeon for its ship, its duty to the passengers was to select a reasonably competent man for that office, and it is liable only for a neglect of that duty.' The Massachusetts case was decided upon a statute of the United States similar to that of Great Britain, and it was there said that the shipowners 'do their whole duty if they employ a duly qualified and competent surgeon and medical practitioner, and supply him with all necessary and proper instruments, medicine, and medical comforts, and have him in readiness for such passengers as choose to employ him.' We think that is the extent of the requirement of the statute in this case, and, if there was any common-law liability resting upon the defendant to make provisio for the care and attendance of its passengers when sick, it was no greater than that imposed by the statute."

Allen v. State Steamship Co., Vol. 15, Lawyers' Reports Ann., p. 168 (N. Y.).

Respectfuly submitted,

Charles H. Carey,

James B. Kerr,

Proctors for Appellees.

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Points and Authorities.